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4 BRIAN H. ROBB, et al.,
5 Plaintiffs,
6 v.
7 FITBIT INC., et al.,
8 Defendants.

9 Case No. 16-cv-00151-SI
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**ORDER DENYING MOTION FOR
PARTIAL RECONSIDERATION**

Re: Dkt. No. 143

12
13 Now before the Court is the motion by defendants Fitbit Inc., James Park, William R.
14 Zerella, and Eric N. Friedman for partial reconsideration of the Court's October 26, 2016 Order
15 denying defendants' motions to dismiss in this proposed securities class action. Dkt. No. 143.
16 Under Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral
17 argument and VACATES the hearing set for January 20, 2017. For the reasons stated below, the
18 Court DENIES the motion for partial reconsideration.

19
20 **BACKGROUND**

21 The facts and procedural history of this case are stated at length in the Court's October 26,
22 2016 Order. *See* Dkt. No. 122. Briefly, plaintiffs brought this case in connection with Fitbit Inc.'s
23 marketing of its heart rate tracking devices. Fitbit Inc. ("Fitbit") manufactures and provides
24 wearable fitness tracking devices. Dkt. No. 89, Am. Compl. ("AC") ¶ 34. Fitbit's products
25 monitor a user's fitness level by tracking daily activity statistics, including steps taken, distance
26 traveled, calories burned, and stairs climbed. *Id.*

27 In an October 27, 2014 press release, Fitbit announced its new "proprietary PurePulse™
28 optical heart rate technology" ("PurePulse"), which claimed to provide "continuous and automatic

1 wrist-based heart rate tracking, without an uncomfortable chest strap.” *Id.* ¶ 46. The press release
2 announced two new products featuring PurePulse: the Fitbit Charge HR and the Fitbit Surge. *Id.*
3 ¶ 52. Fitbit’s advertising for the Charge HR and Surge focused heavily on their heart rate and
4 monitoring features, including slogans such as “Every Beat Counts.” *Id.* ¶ 60.

5 On May 7, 2015, Fitbit filed a registration statement in connection with its initial public
6 offering (“IPO”). *Id.* ¶ 36. The final amended registration statement was filed on June 6, 2015.
7 *Id.* On or about June 18, 2015, Fitbit completed its IPO. *Id.* ¶ 39. On November 2, 2015, Fitbit
8 filed a registration statement in connection with a secondary public offering. *Id.* ¶ 40. On or
9 about November 13, 2015, Fitbit completed its secondary offering. *Id.* ¶ 42.

10 The Amended Complaint alleges that “[t]he Charge HR and Surge sold very quickly,
11 driving Fitbit’s revenues to grow rapidly in 2015.” *Id.* ¶ 69. The IPO Prospectus noted that the
12 Charge HR and Surge were among “the primary drivers of our revenue growth in the first quarter
13 of 2015.” *Id.* ¶ 70. Driven by sales of these products with PurePulse technology, Fitbit’s revenues
14 reached \$1.858 billion in 2015, compared to \$745.4 million in 2014. *Id.* ¶ 76. Plaintiffs allege
15 that because the heart rate monitoring was the key feature of Fitbit’s most important products, its
16 accuracy was crucial to Fitbit’s business success. *Id.* ¶ 77.

17 Plaintiffs allege that from January 5, 2016 to May 19, 2016, the truth about the inaccuracy
18 of Fitbit’s heart rate tracking devices was revealed in a class action lawsuit¹ and subsequent
19 reporting and in a study on the accuracy of the devices. *Id.* ¶ 80. Fitbit’s stock fell from a high of
20 \$30.96 per share on January 5 to close at \$13.99 per share on May 19. *Id.*

21 Plaintiff Brian Robb filed this securities class action lawsuit on January 11, 2016. Dkt. No.
22 1. Fitbit Investor Group was appointed lead plaintiff on May 10, 2016. Dkt. No. 73. Plaintiffs
23 filed their Amended Complaint on July 1, 2016, bringing suit against Fitbit, individuals at Fitbit,
24 and underwriters of Fitbit’s IPO. Dkt. No. 89.

25 Plaintiffs allege that “[a]s a result of Defendants’ false and misleading statements about the
26 accuracy of Fitbit’s heart rate-tracking, Fitbit securities were offered and traded at inflated prices.”

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¹ *McLellan v. Fitbit, Inc.*, No. 3:16-cv-00036-JD (N.D. Cal. Jan. 5, 2016).

1 AC ¶ 99. Further, plaintiffs allege that after the inaccuracy of Fitbit's heart rate tracking was
 2 revealed by the *McLellan* lawsuit, as well as by subsequent reporting and a study of the devices,
 3 Fitbit's stock suffered a "precipitous decline," losing 54.8 percent of its market value. *Id.* ¶¶ 80-
 4 81, 99. Plaintiffs argue that this caused them significant losses and damages. *Id.* ¶ 99.

5 Relevant to the current motion, plaintiffs bring claims under the Securities Exchange Act
 6 of 1934 (the "Exchange Act"), 15 U.S.C. § 78 et seq., on behalf of a class of all persons who
 7 purchased or otherwise acquired Fitbit securities on the open market between June 18, 2015, and
 8 May 19, 2016.² *Id.* ¶ 3. Plaintiffs allege violations of Section 10(b) of the Exchange Act, 15
 9 U.S.C. § 78j(b), against defendants Fitbit, Park, Zerella, and Friedman.³ *Id.* ¶¶ 3, 38, 198-209.
 10 During the time period in question, defendant Park has served as Chief Executive Officer,
 11 Chairman, and President of Fitbit; defendant Zerella has served as Chief Financial Officer; and
 12 defendant Friedman has served as Chief Technology Officer. *Id.* ¶¶ 21-23. Plaintiffs allege that
 13 these defendants acted knowingly or were deliberately reckless in issuing materially false or
 14 misleading statements and/or in failing to disclose material facts concerning the inaccuracy of
 15 Fitbit's heart rate tracking devices. Plaintiffs also allege violations of Section 20(a) of the
 16 Exchange Act, 15 U.S.C. § 78t(a), against defendants Park, Zerella, and Friedman by virtue of
 17 their role as control persons of Fitbit. *Id.* ¶¶ 3, 210-215.

18 On October 26, 2016, the Court denied defendants' motions to dismiss the claims of Lead
 19 Plaintiff Fitbit Investor Group. Dkt. No. 122 ("Order"). On December 8, 2016, Fitbit defendants
 20 moved for leave to file a motion for partial reconsideration of the Court's Order pursuant to Civil
 21 Local Rule 7-9(b). Dkt. No. 137 ("Mot."). Plaintiffs opposed the motion. Dkt. No. 140
 22 ("Oppo"). On December 21, 2016, the Court granted the motion.

23 Fitbit defendants now seek partial reconsideration, arguing that plaintiffs have failed to
 24

25 ² Plaintiffs also bring claims under the Securities Act of 1933 (the "Securities Act"), 15
 26 U.S.C. § 77 et seq., on behalf of a class of all persons who purchased or otherwise acquired Fitbit
 A common stock pursuant and/or traceable to Fitbit's IPO on or about June 18, 2015. AC ¶¶ 2, 4.
 These claims are not at issue in the current motion.

27 ³ This Order refers to Fitbit, Park, Zerella, and Friedman collectively as "Fitbit
 28 defendants." References to "individual defendants" are to Park, Zerella, and Friedman
 collectively.

1 sufficiently allege the element of scienter as required in order to state a claim under Section 10(b)
2 the Exchange Act. Fitbit defendants also seek partial reconsideration of the order denying the
3 motion to dismiss plaintiffs' claims under Section 20(a) of the Exchange Act, arguing that because
4 plaintiffs have failed to state a primary violation under Section 10(b), the Section 20(a) claims
5 must likewise be dismissed.

6

7 LEGAL STANDARD

8 The Court applies the legal standard under Federal Rules of Civil Procedure 9(b) and
9 12(b)(6), as well as under the Exchange Act and the Private Securities Litigation Reform Act of
10 1995 ("PSLRA"), as recited in its October 26, 2016 Order. *See* Order at 5-7, 13.

11 A district court may revise an interlocutory order "at any time before the entry of a
12 judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P.
13 54(b); *see also Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996) ("the interlocutory orders
14 and rulings made pre-trial by a district judge are subject to modification by the district judge at
15 any time prior to final judgment") (quoting *In re United States*, 733 F.2d 10, 13 (2d Cir. 1984)).
16 Nevertheless, "a court should generally leave a previous decision undisturbed absent a showing
17 that it either represented clear error or would work a manifest injustice." *Abada v. Charles*
18 *Schwab & Co., Inc.*, 127 F. Supp. 2d 1101, 1102-03 (S.D. Cal. 2000).

19

20 DISCUSSION

21 Fitbit defendants raise a number of grounds why the Court should reconsider its prior
22 Order and dismiss plaintiffs' Exchange Act claims for failure to allege scienter. The Court will
23 address each of these in turn.

24

25 I. Scienter of the Individual Defendants

26 At the outset, the Court notes that Fitbit defendants could have argued in their motion to
27 dismiss that plaintiffs failed to allege scienter as to each of the individual defendants, yet Fitbit
28 defendants did not do so. Nor have Fitbit defendants specifically briefed in their motion for

1 reconsideration or in their reply why plaintiffs' Amended Complaint fails as to Park, Zerella, and
2 Friedman each individually.

3 Instead, Fitbit defendants now assert that the Ninth Circuit requires that “[s]cienter must be
4 considered on a defendant-by-defendant basis” *See Mot.* at 3-4. Defendants overstate: The
5 Ninth Circuit has not expressly held this, nor do the cases Fitbit defendants cite make any such
6 requirement clear. *See, e.g., Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051,
7 1063 (9th Cir. 2014) (finding that a witness statement lacks foundation where, among other
8 reasons, “the witnesses lack first hand knowledge regarding what the individual defendants knew
9 or did not know . . .”). Other of the cases, when read in full context, show that a plaintiff may,
10 under certain circumstances, successfully plead scienter as to an individual executive defendant
11 without allegations regarding that defendant’s direct knowledge. For instance, the Ninth Circuit
12 has explained that

13 Where, as here, the Plaintiffs seek to hold individuals and a company liable on a
14 securities fraud theory, we require that the Plaintiffs allege scienter with respect to
15 each of the individual defendants. *See Glazer Capital Mgmt., LP v. Magistri*, 549
16 F.3d 736, 743-44 (9th Cir. 2008). We may, however, impute scienter to individual
17 defendants in some situations, for example, where we find that “a company’s public
18 statements [are] so important and so dramatically false that they would create a
19 strong inference that at least *some* corporate officials knew of the falsity upon
20 publication.” *Id.* at 744.

21 *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 607 (9th Cir. 2014).

22 Nevertheless, the Court has separately examined the allegations as to the individual
23 defendants and reiterates its finding that plaintiffs’ allegations raise a strong inference of scienter
24 when viewed holistically, as prescribed by *Tellabs, Inc. v. Makor Issues and Rights, Inc.*, 551 U.S.
25 308 (2007). In its prior Order, the Court found that “the allegations in this case are at least as
26 cogent or compelling as a plausible alternative inference, namely that Fitbit executives were
27 simply unaware of the high degree of inaccuracy in PurePulse devices alleged.” Order at 18. The
28 Court cited in particular to the contributions the devices made to Fitbit’s revenue stream and the
allegations by confidential witnesses (“CWs”) 1 and 2. *Id.*

Fitbit defendants now argue that plaintiffs have failed to establish scienter as to the
individual defendants under the core operations inference. Mot. at 5. After *Tellabs*, the Ninth

1 Circuit has explained that

2 allegations regarding management's role in a company may be relevant and help to
3 satisfy the PSLRA scienter requirement in three circumstances. First, the
4 allegations may be used in any form along with other allegations that, when read
5 together, raise an inference of scienter that is "cogent and compelling, thus strong
6 in light of other explanations." . . . This view takes such allegations into account
7 when evaluating all circumstances together. Second, such allegations may
8 independently satisfy the PSLRA where they are particular and suggest that
9 defendants had actual access to the disputed information Finally, such
10 allegations may conceivably satisfy the PSLRA standard in a more bare form,
11 without accompanying particularized allegations, in rare circumstances where the
12 nature of the relevant fact is of such prominence that it would be "absurd" to
13 suggest that management was without knowledge of the matter. . . .

14 *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785-86 (9th Cir. 2008) (internal citations omitted).

15 By their motion for reconsideration, Fitbit defendants appear to conflate the three
16 circumstances that the Ninth Circuit has outlined, arguing that the Court could not have found
17 scienter on a holistic review of the allegations because this case does not present the "exceedingly
18 rare" circumstance in which it would be "absurd to suggest" the defendants were unaware of the
19 falsity of the challenged statements. *See* Mot. at 6. This argument misconstrues the first
20 circumstance that the Ninth Circuit identified in *South Ferry*, where a core operations inference
21 will satisfy the scienter requirement if it is among allegations that "read as a whole" establish
22 scienter. *See S. Ferry*, 542 F.3d at 784.

23 This is the relevant circumstance here. As the Court's prior Order explained, "a holistic
24 review of the allegations [in the Amended Complaint] suffices to establish scienter." Order at 18.
25 The Amended Complaint alleges that Fitbit hired CW1 "specifically to develop quality-assurance
26 analytics for Fitbit's Charge HR, Surge, and other wearable devices." AC ¶ 164. CW1 reported
27 directly to Fitbit Chief Operations Officer Hansgregory C. Hartmann and presented Hartmann
28 with monthly reports that "noted significant issues with the accuracy of Fitbit's heart-rate
monitoring, relative to other types of failures." *Id.* ¶¶ 165-166, 185. Hartmann reported directly
to Fitbit's CEO, defendant Park. *Id.* ¶ 183. CW2 was a contract fitness tester, hired "primarily to
test the accuracy of Fitbit's heart-rate monitoring devices . . ." *Id.* ¶ 175. CW2 "ultimately

1 reported” to COO Hartmann.⁴ *Id.* ¶ 177. CW2 “found Fitbit’s heart-rate monitoring devices to be
2 highly inaccurate, particularly during vigorous exercise.” *Id.* ¶ 179. According to CW1,
3 defendant Park “frequently visited the Testing Area.” *Id.* ¶ 174. Moreover, as alleged, the Surge
4 and the Charge HR devices “provided Fitbit with 80% of its 2015 revenue.” *Id.* ¶ 152.

5 The Court restates that it finds these allegations, “when read together, raise an inference of
6 scienter that is “cogent and compelling, thus strong in light of other explanations.” *See S. Ferry,*
7 542 F.3d at 785. It is far more plausible that the CEO, CFO, and CTO of Fitbit knew of the
8 outcomes of quality assurance testing, conducted “specifically” or “primarily” to assess the
9 functioning of the heart rate monitoring products that accounted for 80% of Fitbit’s revenue, than
10 is the alternative inference, “namely that Fitbit executives were simply unaware of the high degree
11 of inaccuracy in PurePulse devices alleged.” *See Order at 18.*

12 In addition, plaintiffs have a colorable argument that the third circumstance of the core
13 operations theory may apply. In *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982, 984
14 (9th Cir. 2008), the defendant company received 80% of its revenue from two federal government
15 agencies. Plaintiffs sued for violations of securities laws after the company counted four “stop-
16 work” orders as backlogs (work contracted for but not yet performed), when in reality a stop-work
17 order halted payment and often resulted in the work contract being cancelled altogether. *Id.* The
18 Ninth Circuit found that plaintiffs had adequately pled scienter, even though they were only able
19 to “infer that these high-level managers must have known about the orders because of their
20 devastating effect on the corporation’s revenue.” *Id.* at 987-88. The Court finds there are
21 analogies to be drawn between *Berson* and the facts alleged here, although the Court continues to
22 rest its decision on the finding that plaintiffs have alleged scienter of the individual defendants
23 when viewed through a holistic lens.⁵

24 _____
25 ⁴ Fitbit defendants are correct that the Court previously misstated these relationships in
26 saying that “both CW 1 and CW 2 reported directly to COO Hartmann.” *See Order at 17.* This
does not, however, alter the Court’s ultimate conclusion.

27 ⁵ Fitbit defendants further argue that plaintiffs must include allegations regarding adverse
28 business impact, and that because there are no such allegations in the Amended Complaint, then
plaintiffs’ theory fails. Dkt. No. 146 (“Reply”) at 5-6. However, nothing in the *Berson* decision
creates such a rule, and Fitbit defendants fail to cite authority for this position.

1 Fitbit defendants also argue there can be no scienter as to the individual defendants due to
2 weaknesses regarding plaintiffs' confidential witness statements. Mot. at 5-6. Relying primarily
3 on the Ninth Circuit's decision in *Intuitive Surgical*, Fitbit defendants argue that the confidential
4 witness statements cannot be indicative of scienter because the CWs lacked direct access to the
5 individual defendants and do not link specific reports to those defendants. *Id.* at 5.

6 The Court finds *Intuitive Surgical* distinguishable from the facts alleged here. That case
7 involved broad allegations regarding the company's financial health that the court could not even
8 pinpoint as false. See *Intuitive Surgical*, 759 F.3d at 1055, 1058. As proof of scienter, the
9 plaintiffs there "point[ed] to the impressions of witnesses who lacked direct access to the
10 executives but claim that the executives were involved with Intuitive's day-to-day operations and
11 were familiar with the contents of . . . software-generated reports" that "contain[ed] undisclosed
12 sales data . . ." *Id.* at 1062-63. The Ninth Circuit rejected this theory of scienter, finding that
13 there were no allegations linking the reports (or the witnesses) to the executives, and that "[m]ere
14 access to reports containing undisclosed sales data is insufficient . . ." *Id.* at 1063.

15 The allegations here, however, are more concrete. Rather than relying on allegations of
16 broad misstatements regarding a company's finances, and pointing to "reports containing
17 undisclosed sales data," plaintiffs here have alleged specific misstatements regarding PurePulse's
18 monitoring accuracy, and rely on confidential witnesses who were hired for the purpose of testing
19 such accuracy and who reported their findings up the chain within the company. Plaintiffs'
20 allegations go beyond merely claiming that executives were involved in day-to-day operations and
21 were therefore familiar with automated reports about the company's financial health. CW1
22 personally generated the reports documenting failures with the devices and presented the reports to
23 COO Hartmann. AC ¶¶ 166-167. Although it is not clear from the Amended Complaint in what
24 format CW2 presented his/her findings, CW2 managed the logging of fitness testers' heart rate
25 results. *Id.* ¶ 177. The Amended Complaint states that "CW1 and CW2 both provided
26 Hartman[n] with information about the inaccuracy of Fitbit's heart-rate monitoring devices." *Id.* ¶
27 185. Thus, the witnesses here have personal knowledge about the contents of the reports that was
28 lacking in *Intuitive Surgical*.

1 Although Fitbit defendants are correct that the Amended Complaint does not contain
2 express allegations that COO Hartmann gave this information to defendants Park, Zerella, and
3 Friedman, the Court does not find this fatal to plaintiffs' Exchange Act claims.⁶ Although the
4 Ninth Circuit has found that "allegations may *independently* satisfy the PSLRA where they are
5 particular and suggest that defendants had actual access to the disputed information," this is but
6 one of the three circumstances that may support a scienter finding under a core operations theory.
7 *See S. Ferry*, 542 F.3d at 785-86 (emphasis added). As explained above, the Court rests its
8 finding on a holistic evaluation of the allegations. That plaintiffs' allegations do not directly
9 connect the dots between Hartmann's knowledge and the individual defendants will not be
10 grounds for dismissing the complaint. The Court finds it to be a "cogent and compelling"
11 argument that information regarding the basic functioning of products that constituted 80% of
12 Fitbit's revenue stream, if given to Hartmann as alleged, would also have been known to the
13 individual defendants. *See Tellabs*, 551 U.S. at 324.

14

15 **II. Corporate Scienter as to Fitbit**

16 Fitbit defendants also argue there is no scienter as to defendant Fitbit Inc. They argue the
17 Court's prior Order finding scienter as to Fitbit "is exactly the sort of collective scienter theory
18 rejected by the Ninth Circuit in *Glazer*." Mot. at 8. Plaintiffs note that Fitbit defendants do not
19 dispute that if plaintiffs have adequately alleged scienter as to the individual defendants then
20 scienter may properly be imputed to the company. Oppo. at 18. In their reply, Fitbit defendants
21 do not challenge this statement but focus on their argument that plaintiffs have failed to establish
22 the individual defendants' scienter. *See Reply* at 8.

23

24 The Ninth Circuit has not rejected the theory of collective scienter outright but has left
25 open the possibility that it may apply in certain situations. *See Glazer*, 549 F.3d at 744 ("there

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27 ⁶ Allegations tracing the knowledge of Hartmann to the individual defendants include that
28 Hartmann reported directly to defendant Park; that "CW1 believes Hartmann provided CW1's
findings and recommendations to members of the Company's executive team, including Park;"
and that "[u]pon information and belief, Defendants Park, Zerella, and Friedman were aware of
CW1's findings and recommendations when making public statements to investors." AC ¶¶ 183,
186-187.

1 could be circumstances in which a company's public statements were so important and so
2 dramatically false that they would create a strong inference that at least *some* corporate officials
3 knew of the falsity upon publication") (citing *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513
4 F.3d 702, 710 (7th Cir. 2008)), 745 (noting that the issue of collective scienter "is not before us").
5 *Glazer* involved a company that made and sold explosive detection systems. *Id.* at 739. Prior to
6 the finalization of a merger with General Electric, potential violations of the Foreign Corrupt
7 Practices Act of 1977 became public. *Id.* The Ninth Circuit examined whether the plaintiffs
8 needed to plead scienter as to the defendant CEO, who signed the merger agreement containing
9 the alleged false statements, or whether they could "hold the company as a whole responsible"
10 under a collective scienter theory. *Id.* at 743. Noting that the plaintiffs' securities claim rested on
11 three statements contained in the sixty-page merger agreement, the court found that, "given the
12 limited nature and unique context of the alleged misstatements in this case, we hold that the
13 PSLRA requires *Glazer* to plead scienter with respect to those individuals who actually made the
14 false statements in the merger agreement." *Id.* at 745. Significantly, the plaintiffs "pled no facts
15 that directly demonstrate [the CEO] possessed the requisite scienter when he made the
16 representations contained in the merger agreement." *Id.* Given that "the surreptitious nature of
17 the transactions creates an equally strong inference that the [illegal] payments would have
18 deliberately been kept secret" there was no strong inference of scienter in that case. *Id.* at 746-47.

19 Here, there is nothing inherently surreptitious about the nature of the underlying alleged
20 violations; that is, there is no equally strong inference that the shortcomings of a new
21 technological feature of a company's product would deliberately have been kept secret from the
22 company's CEO, CFO, and CTO. This is particularly so where employees were hired specifically
23 to test the accuracy of this feature. *See AC ¶¶ 164, 175.* More importantly, unlike in *Glazer*,
24 plaintiffs here have sufficiently pled scienter as to the individual executive defendants. *See § I,*
25 *supra*. The Ninth Circuit made clear in *Glazer* that if the plaintiffs had properly pled individual
26 scienter with respect to the CEO, who "was responsible for actually making the statements in the
27 merger agreement," then a finding of scienter as to the company would have been appropriate.
28 *See Glazer*, 549 F.3d at 745. Given that the Court has found scienter as to the individual

1 defendants in this case, scienter may properly be imputed to the company as well.
2

3 **III. Fitbit's IPO and Scienter**

4 Fitbit defendants further ask the Court to reconsider its Order "accept[ing] Plaintiffs'
5 argument that 'in preparation for its IPO, Fitbit's management had an incentive to inflate the
6 company's prospects" Mot. at 7. Previously, the Court found plaintiffs' allegations
7 regarding the upcoming IPO and the fact that "the Charge HR and Surge were key revenue drivers
8 for the company" would indeed "provide a powerful incentive." Order at 14. The use of the
9 qualifier "powerful" may have been an overstatement, but the Court finds no legal error in stating
10 that these allegations "may be relevant to a holistic inquiry into scienter." *See id.*

11 In any event, this is of no consequence because the Court previously made clear that its
12 decision did not rest on a finding that an IPO might provide an incentive to inflate a company's
13 prospects. *See* Order at 14. The Court noted that "mere motive and opportunity" does not suffice
14 to demonstrate scienter under the PSLRA, and the Court did not focus on these allegations of the
15 Amended Complaint in viewing plaintiffs' claims holistically. *See id.* at 14, 17-18. Because the
16 Court's Order did not turn on these allegations, there is nothing for the Court to reconsider here.
17

18 **IV. Non-Defendant Hartmann and Negative Internal Reports**

19 Finally, Fitbit defendants urge that there is no scienter because the "Amended Complaint
20 fails to describe the contents of any negative internal reports, as required under Ninth Circuit law."
21 Mot. at 9. They argue that the failure to describe the reports means that there can be no scienter as
22 to Hartmann and therefore there can be no scienter as to the individual defendants.

23 As described above, *Intuitive Surgical*, on which defendants rely, involved software
24 generated reports "containing undisclosed sales data." *See* 759 F.3d at 1056, 1063. The plaintiffs
25 there alleged that the software that created the reports "was 'accessible on-line and thus available
26 at all times' to the individual defendants" and "that the individual defendants knew or should have
27 known that system placement was decreasing and that this decreased growth was evident from the
28 software-generated reports to which the executives had access." *Id.* at 1056-57. Likewise, in

1 *Lipton v. Pathogenesis Corporation*, 284 F.3d 1027, 1036 (9th Cir. 2002), the court found a lack
2 of scienter where plaintiffs merely asserted in conclusory terms that the defendants had access to
3 internal data demonstrating a decline in sales” The allegations failed where “plaintiffs refer
4 to the existence of the [relevant] data and make a general assertion about what they think the data
5 shows, [but] plaintiffs do not allege with particularity any specific information showing that [the]
6 data informed defendants that patient demand for [defendant’s product] was flat.” *Id.*

7 *Intuitive Surgical* and *Lipton* differ in critical respects from the situation at hand here,
8 where CW1 states that he created the reports, that “his monthly reports noted significant issues
9 with the accuracy of Fitbit’s heart-rate monitoring, relative to other types of failures,” and that he
10 personally presented those reports to COO Hartmann. *See* AC ¶¶ 166-167. Given these
11 allegations, the Court simply cannot credit Fitbit defendants’ argument that plaintiffs have failed
12 to allege scienter as to Hartmann.

13 As Judge Davila of this district has noted, “The Ninth Circuit does not appear to require
14 the contents of the report to be alleged, but rather provides that as an example to demonstrate how
15 a witness statement can be corroborated.” *In re Intuitive Surgical Sec. Litig.*, No. 13-cv-1920-
16 EJD, 2014 WL 7146215, at *5 (N.D. Cal. Dec. 15, 2014). Even if this were not so, the Court finds
17 that plaintiffs’ allegations sufficiently detail the contents of the negative reports at this stage. The
18 specificity that Fitbit defendants seek, such as the frequency of alleged failures and the precise
19 level of inaccuracy, crosses into territory better evaluated on a motion for summary judgment. *See*
20 Mot. at 9; Reply at 10.

21 Having reviewed the papers filed and the authority cited therein, the Court concludes that
22 many of the cases that Fitbit defendants cite are not “dispositive Ninth Circuit authority” as
23 defendants contend, but are distinguishable from the case at hand in critical ways. Overall, the
24 Court agrees with plaintiffs that Fitbit defendants “confuse the question of whether an allegation is
25 *independently sufficient* to establish scienter with the question of whether it is *relevant* as part of a
26 holistic scienter analysis.” *See* Oppo. at 10. The motion for reconsideration does not
27 meaningfully address the holistic review on which the Court’s prior Order and this Order rest.
28 The Court remains mindful that, “[i]n assessing the allegations holistically as required by *Tellabs*,

1 the federal courts certainly need not close their eyes to circumstances that are probative of scienter
2 viewed with a practical and common-sense perspective.” *S. Ferry*, 542 F.3d at 784.

3 Whether in fact the Fitbit devices failed to measure users’ heart rates accurately, and
4 whether in fact Fitbit defendants knew of such failure, are questions to be determined another day.
5 For now, plaintiffs have sufficiently alleged the necessary elements to proceed on their claims
6 under the Exchange Act.⁷

7

8 **CONCLUSION**

9 For good cause shown, the Court DENIES Fitbit defendants’ motion for reconsideration of
10 the October 26, 2016 Order denying defendants’ motions to dismiss.

11

12 **IT IS SO ORDERED.**

13 Dated: January 19, 2017

14 
15 SUSAN ILLSTON
16 United States District Judge

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27 _____
28 ⁷ Given that the Court denies the motion to reconsider plaintiffs’ claim under Section 10(b)
of the Exchange Act, the Court will also allow plaintiffs’ Section 20(a) claim to proceed.